

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HOWARD BERRY and DAVID BERRY,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

TRANSDEV SERVICES, INC. f/k/a VEOLIA
TRANSPORTATION SERVICES, INC.;
TRANSDEV NORTH AMERICA, INC., f/k/a
VEOLIA SERVICES, INC.; and FIRST
TRANSIT, INC.,

Defendants.

Case No.: 2:15-cv-01299-RAJ

**DEFENDANT FIRST TRANSIT,
INC.'S MOTION TO DISMISS
TRANSDEV SERVICES, INC.'S
CROSS-CLAIM FOR FAILURE TO
STATE A CLAIM**

**NOTING DATE: NOVEMBER 18,
2016**

TABLE OF CONTENTS

PAGE

I.	INTRODUCTION	1
II.	STATEMENT OF FACTS	3
III.	LEGAL AUTHORITY AND ARGUMENT	4
A.	Standard For Motion To Dismiss Pursuant To FRCP 12(b)(6)	4
B.	Washington Law Places the Obligation to Provide Rest Breaks on the Employer, Which Is Transdev	5
C.	Transdev's First Claim for Relief -- Based on its Allegation That It Was in Privity of Contract With First Transit -- Fails To State A Claim	6
D.	Transdev's Second Claim for Relief -- Based on its Allegation That It Was an Intended Third-Party Beneficiary of First Transit's Contract -- Fails To State A Claim	8
1.	First Transit's Contract Does Not Manifest Any Intent That First Transit Was Assuming a Direct Obligation to Transdev	9
2.	Under Controlling Washington Supreme Court Precedent, Transdev Is Not An Intended Third-Party Beneficiary of the Contract	11
E.	Any Contract that Purported to Indemnify Transdev for Its Obligation to Provide Rest Breaks Would Be Illegal and Unenforceable	15
IV.	CONCLUSION	17

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

Page(s)

CASES

<i>American Pipe and Construction Company v. Harbor Construction Company</i> , 51 Wn.2d 258, 317 P.2d 521 (1958)	7, 8, 12, 13
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)	4, 5
<i>Astra USA, Inc. v. Santa Clara County</i> , 563 U.S. 110 (2011)	11
<i>Babb v. v. Regal Marine Indus., Inc.</i> , 186 Wn. App. 1003 (2015)	7
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)	4, 5, 6
<i>Branch v. Tunnell</i> , 14 F.3d 449 (9th Cir. 1994)	5
<i>Brewer v. Oriard Powder Co.</i> , 66 Wn.2d 187, 401 P.2d 844 (1965)	6
<i>Caldas v. Affordable Granite & Stone, Inc.</i> , 820 N.W.2d 826 (Minn. 2012)	11
<i>D'Amato v. Wis. Gas Co.</i> , 760 F.2d 1474 (7th Cir. 1985)	11
<i>Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.</i> , 105 Wn.2d 878 (1986)	11, 12, 13, 14
<i>Detweiler Bros. v. John Graham & Co.</i> , 412 F. Supp. 416 (E.D. Wash. 1976) (Neill, C.J.)	7
<i>Gustafson v. Bell Atlantic Corp.</i> , 171 F. Supp.2d 311 (S.D.N.Y. 2001)	16

TABLE OF AUTHORITIES
(CONTINUED)

	PAGE
<i>Kilgore v. Shriners Hospitals for Children</i> , 190 Wn. App. 429, 360 P.3d 55 (2015)	15
<i>Lobak Partitions, Inc. v. Atlas Const. Co.</i> , 50 Wn. App. 493, 749 P.2d 716 (1988)	7
<i>Local 1035, Int’l Brotherhood of Teamsters v. Pepsi Allied Bottlers, Inc.</i> , 99 F. Supp.2d 219, (D. Conn. 2000)	16
<i>Lopez v. Smith</i> , 203 F.3d 1122 (9th Cir. 2000) (en banc)	5
<i>Lyle v. Food Lion</i> , 954 F.2d 984 (4th Cir.1992)	16
<i>McDonald Const. Co. v. Murray</i> , 5 Wn. App. 68 (1971)	14
<i>Metzler Inv. V. GMBH v. Corinthian Colleges, Inc.</i> , 540 F.3d 1049 (9th Cir. 2008)	5
<i>Pellino v. Brink’s, Inc.</i> , 164 Wn. App. 668, 267 P.3d 383 (2011)	5, 15, 16
<i>Thomas v. Wilfac, Inc.</i> , 65 Wn. App. 255 (1992)	14
<i>Washington State Nurses Assoc. v. Sacred Heart Medical Center</i> , 175 Wn.2d 822, 287 P.3d 516 (2012)	6
STATUTES	
Fair Labor Standards Act (FLSA)	2, 15, 16
OTHER AUTHORITIES	
Federal Rule of Civil Procedure 12(b)(6)	1, 4, 5
Restatement (Second) of Contracts	11
WAC 296-126-092(4)	5
Washington Minimum Wage Act (WMWA)	15

1
2
3
4
5
6
I. INTRODUCTION

Defendant Transdev Services, Inc.'s ("Transdev") Cross-Claim against newly named Defendant First Transit, Inc. ("First Transit") should be dismissed with prejudice under Federal Rule of Civil Procedure 12(b)(6) because Transdev has not stated and cannot state any claim against First Transit.

7
8
9
10
11
12
13
14
15
16
17
18
As shown by Transdev's allegations, and by the contracts whose contents are alleged in the Cross-Claim (and which the Court can consider on a motion to dismiss for that reason), Plaintiffs are drivers employed by Transdev under Transdev's contract with King County Metro ("King County") to provide paratransit services for individuals with disabilities. Plaintiffs originally filed this lawsuit only against their employer, Transdev, alleging that Transdev had failed to provide rest breaks in accordance with Washington law. It is undisputed that First Transit serves a limited role in providing dispatch and scheduling services for the paratransit program. First Transit has no responsibility for hiring, training, disciplining, firing, or paying the drivers. Further, First Transit does not own any of the vehicles or facilities where the drivers work. It was only when Plaintiffs failed to obtain free discovery from First Transit through a third-party subpoena (which requested extremely burdensome and expensive production of data that is owned by King County) that Plaintiffs filed their First Amended Complaint naming First Transit as a party, and Transdev followed suit by filing its Cross-Claim against First Transit.

19
20
21
22
23
Transdev admits that it employs the drivers who are the plaintiffs in this case, and does not allege that First Transit was a joint employer of the drivers. As the drivers' sole employer, Transdev was solely responsible for ensuring that the drivers received rest breaks under Washington law.

24
25
26
Transdev seeks to shift its responsibility to third-party First Transit by virtue of a contract between First Transit and King County. Transdev is not a party to that contract, and has no other

1 contractual relationship with First Transit. Thus, there is no basis for Transdev to assert that it
2 has a direct contractual right (privity of contract) against First Transit.

3 There is also no basis for Transdev's claim that it is an intended third-party beneficiary of
4 First Transit's contract with King County. The principal term of that contract on which Transdev
5 relies (and which Transdev misrepresents in its Cross-Claim) makes clear that First Transit's
6 obligation is to King County, not to Transdev. That term requires that "The C.C.-Contractor
7 [First Transit] shall work with S.P.-Contractors [Transdev] to develop a plan to ensure driver
8 breaks and lunches *that shall have the least impact on the provision of service*. This plan shall
9 conform to applicable law." Declaration of Breanne Martell ("Martell Decl."), Ex. 2, §
10 6.5(D)(12) (p. 89) (emphasis added). This contractual language does not manifest any intent that
11 First Transit assume a direct contractual obligation to Transdev with regard to the scheduling of
12 breaks. And as discussed below, other provisions of the contract, combined with controlling
13 Washington case law, further establish that Transdev was not an intended third-party beneficiary
14 of the contract between First Transit and King County.

15 Finally, even if Transdev had contractual rights under King County's contract with First
16 Transit (it does not), any contract by which Transdev sought to be indemnified for failing to
17 provide rest breaks to its driver employees would be illegal and unenforceable. Washington has
18 followed a long line of federal cases under the Fair Labor Standards Act in holding that an
19 employer cannot seek indemnification for violations of the Washington Minimum Wage Act
20 because it would undermine the public policy of ensuring that employers are motivated to
21 comply with labor laws. The same public policy applies to the rest break regulation. Thus, even
22 assuming that Transdev has contractual rights under King County's contract with First Transit,
23 Transdev cannot maintain its Cross-Claim against First Transit.

24 For these reasons, Transdev's Cross-Claim against First Transit must be dismissed in its
25 entirety.

II. STATEMENT OF FACTS

King County Metro (“King County”) manages a Paratransit Transportation program to provide van service for members of the public with disabilities. Declaration of Breanne Martell (“Martell Decl.”), Ex. 1 (Transdev Contract), § 4.2 (pp. 39-40). King County contracted with Transdev to have Transdev provide such van transportation services for disabled King County residents. Transdev Defendants’ Answer to First Amended Complaint and Cross-Claim (“Transdev Answer”) [Dkt. No. 25], p. 3, § 3.3. Under the contract, Transdev was the “Service Provider” (S.P.) Contractor, with responsibility to “receive trip schedules from the Control Center on a daily basis” and “send out vehicles with drivers to provide the trips.” Martell Decl., Ex. 1, pp. 1-2 & § 4.1(B)(1) (p. 39); *see also* Transdev Answer, p. 18, § 4. King County also contracted with First Transit, an independent business, to serve as the “Control Center” (C.C.) Contractor and assist the Service Provider (Transdev) by acting as “the point of public contact for ride screening, ride scheduling, and dispatching.” Transdev Answer, p. 4, § 3.5; Martell Decl., Ex. 2 (First Transit Contract), pp. 1-2 & § 4.1(B)(1) (p. 43).

Transdev’s conclusory allegation that it is in privity of contract with First Transit is shown to be false by the contracts themselves. Transdev and First Transit separately contracted with King County to provide different services to King County. Martell Decl., Ex. 1 (Transdev Contract with King County) & Ex. 2 (First Transit Contract with King County); *see also* Transdev Answer, pp. 3-4, §§ 3.3 & 3.5, and p. 18, § 4. King County dictated, through those separate contracts with Transdev and First Transit, how the services would be provided. Martell Decl., Ex. 2, § 6 (pp. 74-99); Ex. 1, § 5 (pp. 50-69). The party funding and ultimately benefiting from the drivers’ work was King County. Martell Decl., Ex. 2, p. 2; Ex. 1, p. 2.

Plaintiffs’ First Amended Complaint (“FAC”) is predicated solely on alleged failures to provide rest breaks to the drivers required by Washington regulation. FAC [Dkt. No. 22], §§ 1.2-1.4, 4.3(b), (c) and (m), 4.4, 5.21-5.31. In turn, Transdev alleges that, to the extent its drivers did not take their rest breaks, First Transit is liable for breaching its contract with King County.

1 Transdev Answer, pp. 19-21, §§ 8-11, 17. It is undisputed that the drivers were employed by
2 Transdev. *Id.*, p. 3, §§ 3.1-3.2, and p. 19, § 6. Indeed, the contract between King County and
3 Transdev specifies that Transdev is responsible for: (1) hiring, training, and supervising drivers;
4 (2) deploying drivers and vehicles on a daily basis; (3) developing a safety program to include
5 driver procedures and driver incentives; (4) ensuring that it has an adequate number of drivers
6 available to provide service; (5) determining work assignments for drivers; (6) ensuring that
7 drivers meet on-time performance standards; and (7) using and maintaining vehicles supplied by
8 King County. Martell Decl., Ex. 1, §§ 5.1(A)(2) (p. 50); 5.1(E)(1)(a), (k) (p. 52); 5.1(G)(1), (3),
9 (6) (p. 54); 5.2(A) (pp. 56-57); 5.2(D) (pp. 57-58); 5.2(F) (pp. 58-59); 5.4 (p. 61). The contract
10 specifically refers to the drivers as “S.P.-Contractor’s [Transdev’s] drivers.” *Id.*, §§ 5.1(D)(4)-
11 (5) (p. 51).

12 The contracts also make clear that First Transit did **not** employ the drivers. Instead, the
13 “staff” of First Transit – those employees that First Transit was responsible for hiring, training,
14 and supervising – were “reservationists, schedulers, dispatchers, passenger service, quality
15 assurance, technical and other support staff to collect data and report.” Martell Decl., Ex. 2, §
16 6.1(A)(5)(a) (pp. 74-75); *see also id.*, § 6.3 (pp. 81-87). Transdev has not made any allegations
17 that First Transit employed the drivers, paid the drivers, or had any control over the wages paid
18 to the drivers, or that the driver’s work was done for First Transit’s benefit.

19 **III. LEGAL AUTHORITY AND ARGUMENT**

20 **A. Standard For Motion To Dismiss Pursuant To FRCP 12(b)(6).**

21 For the Cross-Claim to survive this Rule 12(b)(6) motion, the claims must meet the
22 pleading standard established by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550
23 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.
24 Ct. 1937, 173 L. Ed. 2d 868 (2009). These cases shifted the federal pleading standard from
25 notice pleading to a heightened standard. A complaint must contain “sufficient factual matter,
26 accepted as true, to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678

1 (*quoting Twombly*, 550 U.S. at 570). A claim is facially plausible “when the plaintiff pleads
2 factual content that allows the court to draw the reasonable inference that the defendant is liable
3 for the misconduct alleged.” *Id.* In reviewing a motion to dismiss under Rule 12(b)(6), the
4 Court must assume the truth of the plaintiff’s factual allegations, but is “not required to indulge
5 unwarranted inferences.” *Metzler Inv. V. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049,
6 1064-65 (9th Cir. 2008) (citation omitted). “[A] pleading offering only labels and conclusions or
7 a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at
8 555.

9 In ruling on a Rule 12(b)(6) motion, a district court may consider “documents whose
10 contents are alleged in a complaint and whose authenticity no party questions, but which are not
11 physically attached to the pleading,” without converting the motion into one for summary
12 judgment. *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), *overruled on other grounds*
13 *by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). Here, Transdev has
14 alleged contents of the Transdev and First Transit contracts in its Cross-Claim, *see* Transdev
15 Answer, pp. 18-19, §§ 4-6, and no party questions the authenticity of the documents. Therefore,
16 the Court should consider the contracts in ruling on First Transit’s motion to dismiss.

17 If the pleading “could not possibly be cured by the allegation of other facts,” then the
18 Court should dismiss it with prejudice and deny leave to amend. *Lopez v. Smith*, 203 F.3d 1122,
19 1127 (9th Cir. 2000) (en banc) (internal quotation marks and citations omitted). Pursuant to this
20 legal standard, Transdev’s Cross-Claim should be dismissed in its entirety with prejudice.

21 **B. Washington Law Places the Obligation to Provide Rest Breaks on the**
22 **Employer, Which Is Transdev.**

23 Plaintiffs’ First Amended Complaint is predicated solely on alleged failures to provide
24 rest breaks to the drivers required by Washington regulation. FAC, §§ 1.2-1.4, 4.3(b), (c) and
25 (m), 4.4, 5.21-5.31. Under Washington law, it is the employer’s obligation to provide employees
26 with paid rest breaks and compensate them for missed breaks. WAC 296-126-092(4); *Pellino v.*

1 *Brink's, Inc.*, 164 Wn. App. 668, 688-90, 267 P.3d 383 (2011); *Washington State Nurses Assoc.*
2 *v. Sacred Heart Medical Center*, 175 Wn.2d 822, 831-32, 287 P.3d 516 (2012). It is undisputed
3 that the drivers were employed by Transdev. Transdev Answer, p. 3, §§ 3.1-3.2, and p. 19, § 6;
4 Martell Decl., Ex. 1, §§ 5.1-5.2 (pp. 50-59). Transdev does not allege that First Transit
5 employed or jointly employed the drivers. Transdev Answer, p. 19, § 6. Thus, with respect to
6 Transdev's Cross-Claim, it is undisputed that First Transit had no direct obligation under
7 Washington law to provide the drivers with rest breaks, or to compensate them for missed
8 breaks.

9 **C. Transdev's First Claim for Relief -- Based on its Allegation That It Was in**
10 **Privity of Contract With First Transit -- Fails To State A Claim.**

11 Transdev's Cross-Claim against First Transit is based solely on its allegations that First
12 Transit breached its contract with King County, a contract to which Transdev was not a party.
13 Transdev alleges in a conclusory fashion: "Upon information and belief, First Transit, Transdev,
14 and King County are parties in privity to a contract, and/or series of contracts, for the provision
15 and implementation of King County's paratransit program (the "Contract"). Transdev Answer,
16 p. 18, § 4. The contracts themselves, however, on which Transdev purports to rely, show that
17 this conclusory allegation is false. As is evident on the face of the contracts, there are two
18 separate contracts that were executed at different times: one contract between King County and
19 Transdev (entered into in May 2008), and a separate contract between King County and First
20 Transit (entered into in June 2008). *See* Martell Decl., Ex. 1 & 2. The only entity that is a party
21 to both contracts is King County—no contract exists between First Transit and Transdev. As
22 such, Transdev's demonstrably false allegation that it is in "privity of contract" with First Transit
23 must be disregarded. *Twombly*, 550 U.S. at 555.

24 Contractual privity is a concept that refers to parties with a direct contractual relationship.
25 *See, e.g., Brewer v. Oriard Powder Co.*, 66 Wn.2d 187, 189, 401 P.2d 844, 846 (1965) (holding
26 that plaintiffs who did not purchase anything from defendant were not in contractual privity);

1 *Babb v. v. Regal Marine Indus., Inc.*, 186 Wn. App. 1003, at *2-3 (2015) (unpublished) (holding
2 that, although the contract between the plaintiff-buyer and a dealer identified the defendant-
3 manufacturer, “we conclude that [the plaintiff-buyer] had no contractual relationship with [the
4 defendant-manufacturer] and, therefore, no privity with [the defendant]”); *Detweiler Bros. v.*
5 *John Graham & Co.*, 412 F. Supp. 416, 418 (E.D. Wash. 1976) (Neill, C.J.) (noting that two
6 parties who had contracted separately with a University and the University’s general contractor,
7 and not with each other, did not have privity of contract between them). “Under ordinary
8 circumstances, a stranger to a contract may not sue. A third party may enforce a contract to
9 which he is not in privity only if the contracting parties intended to secure to him personally the
10 benefits of the provisions of the contract.” *Lobak Partitions, Inc. v. Atlas Const. Co.*, 50 Wn.
11 App. 493, 497, 749 P.2d 716, 718 (1988) (holding that sub-contractor could not bring breach of
12 contract claim against parties with whom it did not have a contractual relationship).

13 Here, Transdev alleges that it is in privity of contract with First Transit on the basis that
14 both Transdev and First Transit have related contracts with King County. The Washington
15 Supreme Court, however, has rejected such a claim in a similar case. In *American Pipe and*
16 *Construction Company v. Harbor Construction Company*, 51 Wn.2d 258, 317 P.2d 521 (1958),
17 the City of Anacortes contracted with a pipe supplier and separately contracted with an
18 installation contractor for the city’s new water supply system. *Id.* at 259-60. Among other
19 issues, the installation contractor sought to enforce the pipe supplier’s contract with the city
20 because of the supplier’s delays in delivering pipe past the guaranteed date in the contract. *Id.* at
21 262. The Court began its analysis by asserting “it is plain that no privity of contract existed
22 between the installation contractor and the pipe supplier with regard to the pipe which the
23 supplier contracted with the city to deliver.” *Id.* Nonetheless, the Court proceeded to evaluate
24 the installation contractor’s claim that there was privity of contract based on the rule of
25 interpretation that “contracts which form parts of the same transaction should be read and
26 construed together.” *Id.* at 263. The Court concluded that, while related contracts could be used

1 in interpreting the meaning of each contract, it did not create a contractual relationship between
2 the pipe supplier and the installation contractor. *Id.* at 264-65.¹ Rather, “the true nature of the
3 installation contractor’s contention is that it is entitled to damages...as a third-party beneficiary.”
4 *Id.* at 265. (The Court went on to hold that the installation contractor was not an intended third-
5 party beneficiary either. *See, infra*, section III.D.2.)

6 The same conclusion must be applied in the present case. Just like the City of Anacortes,
7 King County separately contracted with two contractors to accomplish a government project.
8 Similar to the pipe supplier, First Transit contracted with King County to provide scheduling and
9 dispatch services for the paratransit program. Like the installation contractor, Transdev
10 contracted with King County to provide drivers for the paratransit program. Even though the
11 contracts were related, there was no contractual relationship between Transdev and First Transit.
12 As such, Transdev has no claim against First Transit for breach of First Transit’s contract with
13 King County unless it is an intended third-party beneficiary of the contract. As explained below,
14 based on *American Pipe* and other binding authority, Transdev also cannot sue First Transit on a
15 third-party beneficiary theory.

16 **D. Transdev’s Second Claim for Relief -- Based on its Allegation That It Was an**
17 **Intended Third-Party Beneficiary of First Transit’s Contract -- Fails To**
State A Claim.

18 Transdev’s allegations in its Second Claim for Relief fail because First Transit did not
19 undertake an intended third-party beneficiary contractual obligation running directly to
20 Transdev. Instead, Transdev was merely an incidental beneficiary of the contract. An incidental
21 beneficiary has no right to enforce the contract.
22
23
24

25 ¹ The Court also noted that the contracts were not part of the same transaction in any event because they were not
26 made at the same time and place. *Id.* at 265. The same is true here: Transdev’s contract with King County was
entered into in May 2008 and the start-up date was June 1, 2008, while First Transit’s contract with King County
was entered into in June 2008 and the start-up date was July 1, 2008. Martell Decl., Ex. 1, pp. 1-2; Ex. 2, pp. 1-2.

1 **1. First Transit’s Contract Does Not Manifest Any Intent That First**
2 **Transit Was Assuming a Direct Obligation to Transdev.**

3 First Transit’s contract with King County includes no language that can be construed as
4 having been intended to give Transdev a direct right of suit against First Transit for breach by
5 First Transit of its contract with King County. It is noteworthy that Transdev felt compelled to
6 intentionally misrepresent these contractual terms (following Plaintiffs’ lead), twisting their
7 evident meaning, in its efforts to justify a claim against First Transit.

8 **a. Section 4.5(A)(1) of the Contract**

9 Transdev alleges: “The Contract provides that, although Transdev Services is responsible
10 for employing the drivers, First Transit is responsible for managing the routes, scheduling,
11 and dispatch of the drivers, and ensuring compliance with Washington law with regard to
12 driver rest breaks.” Transdev Answer, p. 19, § 6 (emphasis added).

13 The Contract actually provides: “The Contractor is responsible for ensuring compliance
14 with all applicable laws and regulations, including any that require that its employees be
15 provided with periodic breaks during a work day.” Martell Decl., Ex. 2, § 4.5(A)(1) (p.
16 46) (emphasis added).

17 First Transit cannot have breached the second clause (beginning with “including”) in
18 relation to the drivers because, as admitted by Transdev, the drivers were not First Transit’s
19 employees. Rather, as shown by the contracts, First Transit’s employees were the
20 reservationists, schedulers, dispatchers, passenger service staff, quality assurance staff, and
21 technical and support staff. Martell Decl., Ex. 2, § 6.1(A)(5)(a) (pp. 74-75) and § 6.3 (pp. 81-
22 87). Importantly, Transdev’s contract with King County contains a similar provision, making
23 Transdev responsible for ensuring that “its employees,” including the drivers, “be provided with
24 periodic breaks during a work day.” Martell Decl., Ex. 1, § 4.5(A)(1) (pp. 41-42). The initial
25 clause, requiring that the contractors (Transdev and First Transit) ensure that their performance
26 under the contract comply with all applicable laws, is not directed to the drivers and does not
 show an intent to empower Transdev to sue First Transit for a breach of that contractual
 undertaking.

1 **b. Section 6.5(D)(1) of the Contract**

2 Transdev alleges: “First Transit’s performance obligations under the Contract include...(i)
3 Providing dispatch coverage in order to ensure that Transdev Services drivers receive
4 breaks and lunches.” Transdev Answer, p. 19, § 5(i) (emphasis added).

5 The Contract actually provides: “Additionally, the C.C.-Contractor [First Transit] shall
6 provide non-reservation coverage from 5:00 p.m. to 8:00 a.m. to process ride inquiries,
7 comments, and cancellations, to call riders with changes, to optimize service on day of
8 service, and to ensure that its drivers receive breaks and lunches.” Martell Decl., Ex. 2, §
9 6.5(D)(1) (p. 89) (emphasis added).

10 As already shown, First Transit did not employ the Plaintiff drivers. Thus, First Transit
11 cannot have breached this clause with respect to Transdev’s drivers, because this clause requires
12 First Transit to ensure that “its drivers” receive breaks. There is also no allegation that First
13 Transit breached the actual obligation imposed on First Transit by this sentence, which was to
14 “provide non-reservation coverage from 5:00 p.m. to 8:00 a.m.”

15 **c. Section 6.5(D)(12) of the Contract**

16 Transdev alleges: “First Transit’s performance obligations under the Contract include...(h)
17 Developing a plan that ensures Transdev Services drivers receive breaks and lunches.”
18 Transdev Answer, p. 19, § 5(h).

19 The Contract actually provides: “The C.C.-Contractor [First Transit] shall work with
20 S.P.-Contractors [Transdev] to develop a plan to ensure driver breaks and lunches that
21 shall have the least impact on the provision of service. This plan shall conform to
22 applicable law.” Martell Decl., Ex. 2, § 6.5(D)(12) (p. 89) (emphasis added).

23 The first sentence obligated First Transit to “work with” Transdev to develop a plan for
24 driver breaks that had the least impact on the provision of services. The Cross-Claim does not
25 allege a breach of that sentence for the reason that it required driver breaks to be minimized, not
26 provided. The second sentence, stating that the breaks plan “shall conform to applicable law,” is
27 not an undertaking to provide rest breaks to drivers, but rather is merely an acknowledgement by
28 King County that the obligation it was imposing on First Transit to minimize the impact of driver
29 breaks did not require First Transit to ignore Transdev’s obligation to provide legally-required
30 breaks to its employees.

1 In the alternative, to the extent the second sentence is viewed as a contractual undertaking
2 to provide breaks rather than (properly) as a mere limitation on First Transit's obligation to
3 minimize breaks, the second sentence is simply another undertaking by First Transit to execute
4 its contractual obligations to King County in a lawful fashion. This again does not show an
5 intent to empower a third party, Transdev, to sue First Transit for a breach of that contractual
6 undertaking. A promise given by one contracting party to the other to comply with the law in its
7 discharge of its contractual duties does not confer a right to sue on third parties. Such a promise
8 in a contract does not create an intended third-party beneficiary. *See, e.g., Caldas v. Affordable*
9 *Granite & Stone, Inc.*, 820 N.W.2d 826 (Minn. 2012) (holding that employees were not intended
10 third-party beneficiaries of contract between City and their employer that required the employer
11 to pay prevailing wages);² *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110, 118 (2011)
12 (holding that health care facilities were not intended third-party beneficiaries of pricing
13 agreements between pharmaceutical manufacturers and the federal government); *D'Amato v.*
14 *Wis. Gas Co.*, 760 F.2d 1474, 1479-80 (7th Cir. 1985) (holding that employee of a government
15 contractor was not intended third-party beneficiary of affirmative-action clauses required by the
16 Rehabilitation Act).

17 **1. Under Controlling Washington Supreme Court Precedent, Transdev**
18 **Is Not An Intended Third-Party Beneficiary of the Contract.**

19 Transdev's third-party beneficiary contract claim is viable only if the contract between
20 First Transit and King County shows that the parties intended that First Transit would assume a
21 **direct obligation** to Transdev. "Creation of a third-party beneficiary contract requires that the
22 parties intend that the promisor assume a direct obligation to the intended beneficiary at the time
23 they enter into the contract." *Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.*, 105
24 Wn.2d 878, 886 (1986) (quotations and citations omitted). "Such 'intent' is not a desire or
25 purpose to confer a benefit upon the third person, nor a desire to advance his

26 ² Like Minnesota, Washington follows the Restatement (Second) of Contracts on intended third-party beneficiaries.

1 interests.” *American Pipe and Construction Company v. Harbor Construction Company*, 51
2 Wn.2d 258, 266, 317 P.2d 521 (1958) (quotation and citation omitted). The Court must look to
3 the terms of the contract to determine the intent of the parties. *Del Guzzi*, 105 Wn.2d at 887.

4 In *American Pipe*, the Washington Supreme Court held that the plaintiff (installation
5 contractor) could not sue the defendant (pipe supplier) for breach of the pipe supplier’s contract
6 with the City of Anacortes. 51 Wn.2d at 267. Even conceding that the pipe supplier’s
7 performance of its contract with the city would benefit the installation contractor, the court
8 concluded that the contract could not be “construed to confer upon the installation contractor the
9 right to enforce its provisions.” *Id.* at 266. This was so because the pipe supplier’s contract
10 specified the fashion by which *the city* was empowered to enforce the contract against the pipe
11 supplier, thereby excluding any intent that the installation contractor would have a direct right to
12 enforce the contract against the pipe supplier. *Id.* at 266-67. Permitting a third party to enforce
13 the contract would have undermined the city’s contractual right to make changes to the
14 specifications and timelines in the contract. *Id.*

15 Analysis of the enforcement provisions in the contract at issue here compels the same
16 conclusion in this case. First Transit’s contract with King County gives King County, not any
17 third parties, the right to terminate the contract and collect damages for breaches of the contract.
18 Martell Decl., Ex. 2, § 1.3(B) (pp. 18-19). The contract also includes an express agreement
19 between the parties that they will attempt to resolve any disputes first through direct discussions
20 or mediation, followed by arbitration. *Id.*, § 1.12 (p. 22). In the contract, First Transit warrants
21 to King County that its services to King County “shall in all material respects conform to the
22 requirements of this Contract.” *Id.*, § 2.11 (p. 32). If First Transit breaches this warranty, King
23 County is required to provide written notice to First Transit. *Id.*, § 2.12 (p. 32). If First Transit
24 fails to correct the defect within thirty days, “the County, in its sole discretion, may correct the
25 defect itself.” *Id.* The contract further provides that, if King County determines that First
26 Transit’s work does not comply with the contract’s requirements, King County may give notice

1 to First Transit. *Id.*, § 2.13 (p. 33). Within seven days, First Transit is required to provide King
2 County with a written plan to correct the issue, and “[t]he County may reject or accept this plan
3 at its discretion.” *Id.* Thus, just as in *American Pipe*, the contract specified the fashion by which
4 the service recipient, King County, was empowered to enforce the contract, including by
5 providing King County with discretion as to whether and how any breaches would be corrected.
6 As in *American Pipe*, this excludes any intent that Transdev would have a direct right to enforce
7 the contract.

8 Moreover, like the city in *American Pipe*, King County retained the right to make
9 changes to the requirements in the contract. Particularly relevant here, King County reserved the
10 right to “adjust routes as service demands change,” “change service level ranges,” and “adjust
11 the allocation of Vehicle Service Hours of any or all Service Providers higher or lower.” *Id.*, §§
12 4.5(A)(4), 4.5(B)(2), and 4.5(B)(4) (p. 46); § 6.2(A)(1)-(2) (p. 78). Just as in *American Pipe*,
13 these provisions exclude any intent that Transdev would have a direct right to enforce the
14 contract, because such a right would conflict with King County’s rights under the contract.

15 Another analogous Washington Supreme Court decision is *Del Guzzi*, which also held
16 that the plaintiff was not an intended third-party beneficiary. Clallam County entered into a
17 contract with an engineering firm (Kennedy) to plan and supervise a construction project. The
18 County also entered into a contract with a construction company (Del Guzzi), who contracted
19 with a subcontractor (Global) to complete a portion of the work. Del Guzzi later filed suit
20 against Global because of costs it incurred in assisting Global to complete some of its work.
21 Global counter-claimed for cost overruns, alleging that it was a third-party beneficiary of the
22 County/Del Guzzi contract because the contract required minority participation in order to
23 receive federal funding. Global also filed a third-party action against the County and Kennedy,
24 alleging that they breached a contractual duty to provide suitable specifications and oversight for
25 the project as required by their contract. *Id.* at 880-81. The Court held that Global was not an
26 intended third-party beneficiary of either contract because the parties did not manifest an intent

1 that the County or Kennedy would assume a direct obligation to Global. Instead, any benefits
2 derived by Global from the contracts were incidental. *Id.* at 887.

3 Similar to the contractors in *Del Guzzi*, both Transdev and First Transit entered into
4 related contracts to accomplish a County project, but did not enter into a contract with each
5 other. Like Global, the subcontractor who attempted to bring a third-party action for breach of
6 contract against parties with which it had not contracted (including Kennedy), Transdev is
7 attempting to bring a third-party action for breach of contract based on a contract to which it was
8 not a party. First Transit (like Kennedy) separately contracted with the County, to perform
9 planning and monitoring aspects of the work, which included a promise to work with Transdev
10 to develop a plan for driver breaks (similar to Kennedy's obligation to provide specifications).
11 This plan also incidentally benefited Transdev as the employer of the drivers (similar to Global).
12 Just like *Del Guzzi*, there is nothing in First Transit's contract with King County that manifests
13 an intent to create a direct obligation to Transdev.

14 Other courts have reached the same conclusion under similar circumstances. *See, e.g.,*
15 *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 263 (1992) (holding that patient was not third-party
16 beneficiary of doctor's employment contract wherein he promised to "provide medical services
17 with the highest degree of medical competency"); *McDonald Const. Co. v. Murray*, 5 Wn. App.
18 68, 70-71 (1971) (holding that tenant was not third-party beneficiary of contract between
19 construction company and building owner wherein construction company promised to complete
20 work within 75 calendar days).

21 Thus, based on controlling authority from the Washington Supreme Court and the intent
22 manifested in the language of the contract, Transdev is at most an incidental – not intended –
23 third-party beneficiary of First Transit's contract with King County. There is no legal basis for
24 Transdev to enforce any alleged breach in the contract between First Transit and King County.
25
26

1 **E. Any Contract that Purported to Indemnify Transdev for Its Obligation to**
2 **Provide Rest Breaks Would Be Illegal and Unenforceable.**

3 Even if Transdev had contractual rights to enforce First Transit's contract with King
4 County (which it does not), Transdev may not lawfully use a contract to obtain indemnity for the
5 claims that are asserted against it in this case. This is so because any contract that purports to
6 indemnify an employer for breaching rest break or wage obligations to its employees is unlawful
7 and unenforceable as a matter of public policy.

8 In *Kilgore v. Shriners Hospitals for Children*, 190 Wn. App. 429, 360 P.3d 55 (2015), an
9 employee sued her employer, a hospital, under the Washington Minimum Wage Act
10 ("WMWA") for underpayment of wages. The hospital, in turn, asserted a counterclaim of
11 breach of implied contract (implied contractual indemnity) against the employee, its former
12 director of fiscal services, who had been responsible for administering payroll practices, claiming
13 she was at fault for the underpayment. *Id.* at 430. The Washington court of appeals held, based
14 on its analysis of case law under the Fair Labor Standards Act (FLSA) and the purposes of the
15 WMWA, that the employer could not sue in contract to be indemnified for violations of the
16 WMWA. *Id.* at 434-36. The court concluded that that "the [W]MWA's statutory goals would be
17 undermined by diminishing the employer's compliance incentives if an employer were permitted
18 to seek indemnity...." *Id.* at 435.

19 The Plaintiffs here have sued Transdev under the WMWA for alleged failures to pay
20 wages. *Kilgore* is directly on point with regard to Transdev's effort to seek indemnification from
21 First Transit for those claims.

22 *Kilgore* also precludes Transdev's effort to be indemnified for Plaintiffs' claims of
23 breaches of the rest breaks regulation itself. The same public policy the supports the WMWA
24 also supports the rest break regulation, which is part of Washington's "long and proud history of
25 being a pioneer in the protection of employee rights." *Pellino*, 164 Wn. App. at 684. If
26 Transdev could avoid the consequences of failing to provide its employees with rest breaks

1 through a contract with a third party, then its incentive to ensure that its employees received their
2 rest breaks would be reduced. Such a result would undermine the purpose of the rest break
3 regulation, which is to ensure that employers provide their employees with breaks. *See Pellino*,
4 164 Wn. App. at 688-90.

5 Federal authority developed under the FLSA, which is persuasive authority when
6 interpreting Washington law, buttresses this conclusion. Numerous courts have held that
7 employers cannot obtain contractual indemnification for their FLSA obligation to pay minimum
8 wages and overtime, whether from co-employers or third parties who are responsible for the
9 violations. *See, e.g., Lyle v. Food Lion*, 954 F.2d 984, 987 (4th Cir.1992) (affirming dismissal of
10 employer's counterclaim and third-party complaint for contractual indemnity against manager for
11 plaintiffs' FLSA claims); *Local 1035, Int'l Brotherhood of Teamsters v. Pepsi Allied Bottlers*,
12 *Inc.*, 99 F. Supp.2d 219, 221-22 (D. Conn. 2000) (holding that indemnification clause in
13 collective bargaining contract was void to the extent it relieved employer of liability for FLSA
14 violations, and dismissing employer's counter-claim against union); *Gustafson v. Bell Atlantic*
15 *Corp.*, 171 F. Supp.2d 311, 327-28 (S.D.N.Y. 2001) (dismissing contractual claim for indemnity
16 of FLSA liability and holding that "allowing defendants to obtain indemnification from [the
17 plaintiff's former company] contradicts the policies of the FLSA"). In *Gustafson*, for example,
18 the defendants had entered into a contract with the plaintiff's former company, which contained
19 an indemnification clause and required the plaintiff's company to comply with the law. 171 F.
20 Supp. 2d at 327. The defendants' attempts to characterize their claim as a breach of contract did
21 not disguise the true nature of their claim for indemnity, which was not permitted under the
22 FLSA. *Id.* at 328.

23 In sum, the contractual rights that Transdev claims (which do not exist) would be illegal
24 and unenforceable in any event. Even in a direct contract between Transdev and First Transit,
25 Transdev could not indemnify itself and sidestep the obligation to provide its employees with
26 rest breaks. Said another way, First Transit's agreement with King County to "work with"

Transdev on developing a plan for breaks does not permit Transdev to transfer to First Transit the obligation that Transdev had under Washington law to provide rest breaks to its employees. To the extent that drivers missed their breaks, Transdev was solely responsible for compensating them as required by Washington law, and under binding precedent Transdev cannot seek indemnity or contribution from First Transit. Any such contract is illegal and unenforceable under Washington law.

IV. CONCLUSION

For the foregoing reasons, Transdev's Cross-Claim against First Transit should be dismissed with prejudice.

October 24, 2016

s/ Breanne Sheetz Martell

Daniel L. Thieme, WSBA #12855

dthieme@littler.com

Breanne Sheetz Martell, WSBA #39632

bsmartell@littler.com

Vanessa B.K. Lee, WSBA #46547

vblee@littler.com

LITTLER MENDELSON, P.C.

One Union Square

600 University Street, Suite 3200

Seattle, WA 98101.3122

Phone: 206.623.3300

Fax: 206.447.6965

Attorneys for Defendant
FIRST TRANSIT, INC.

CERTIFICATE OF SERVICE

I am a resident of the State of Washington, over the age of eighteen years, and not a party to the within action. My business address is One Union Square, 600 University Street, Ste. 3200, Seattle, WA 98101. On October 24, 2016, I

✕ **ELECTRONICALLY FILED** the foregoing document(s) with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

<p>Toby J. Marshall, WSBA #32726 tmarshall@terrellmarshall.com Jennifer Rust Murray, WSBA # 36983 jmurray@terrellmarshall.com Erika L. Nusser, WSBA #40854 enusser@terrellmarshall.com TERRELL MARSHALL LAW GROUP PLLC 936 North 34th Street, Suite 300 Seattle, Washington 98103-8869 Telephone: 206-816-6603 Facsimile: 206-319-5450</p>	<p>Jeffrey Needle, WSBA #6346 jneedle@wolfenet.com LAW OFFICES OF JEFFREY L. NEEDLE 119 1st Avenue, Suite 200 Seattle, Washington 98104 Telephone: 206-447-1560 Facsimile: 206-447-1523</p>
---	---

Attorneys for Plaintiffs

Attorneys for Plaintiffs

Stellman Keehnel, WSBA No. 9309
stellman.keehnel@dlapiper.com
Anthony Todaro, WSBA No. 30391
anthony.todaro@dlapiper.com
Austin Rainwater, WSBA No. 41904
austin.rainwater@dlapiper.com
DLA PIPER US LLP (WA)
701 Fifth Avenue, Suite 7000
Seattle, Washington 98104-7044
Tel: 206.839.4800
Fax: 206.839.4801

Attorneys for Transdev Defendants

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on October 24, 2016, at Seattle, Washington.

s/ Sally Swearinger

Sally Swearinger

sswearinger@littler.com

LITTLER MENDELSON, P.C.

Firmwide:143368785.5 070993.1104